

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2005-014235-001 DT

11/30/2015

HON. SAM J. MYERS

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

JASON BYARD EASTERDAY
LAWRENCE A HAMMOND
ANNE M CHAPMAN

v.

RONNIE LOVELLE JOSEPH (001)

NATMAN SCHAYE

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC
JOSEPH J PERKOVICH
LAW OFFICE OF JOSEPH PERKOVICH
PO BOX 2171
NEW YORK NY 10008

MINUTE ENTRY

Following a hearing on November 3, 2015, the Court took under advisement Sandra Brown's Motion to Re-Open Sentencing. The Court has reviewed and considered Sandra Brown's Motion to Re-Open Sentencing filed 8/5/2015, the State's Response to Motion to Reopen Sentencing filed 8/14/2015, Sandra Brown's Reply in Support of Motion to Reopen Sentencing filed 8/24/2015, Defendant's Motion to Join Sandra Brown's Motion to Reopen Sentencing filed 8/31/2015, the State's Notice of Disclosure [of the Affidavit of Mitchell Eisenberg] filed 8/25/2015, Sandra Brown's Response to Notice of Disclosure filed 9/30/2015, the State's Reply to Notice of Disclosure filed 10/13/2015, and Defendant's Memorandum regarding November 3, 2015 Legal Argument filed 10/27/2015, as well as oral argument held November 3, 2015.

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In her Motion to Reopen Sentencing, Ms. Sandra Brown¹ identified herself as a victim in the defendant's case and stated that she "believes she was not notified of her rights as a crime victim under the Arizona Constitution and Arizona law." Motion to Reopen at 1. Ms. Sandra Brown sought to "reopen sentencing proceedings" to afford her the opportunity to be heard and to vindicate her rights.

The State declined to concede factual matters, including whether Ms. Sandra Brown is a statutory victim and whether the State had an obligation to Ms. Sandra Brown.

The Court notes that it became aware of Ms. Sandra Brown's invocation of victims' rights in August of 2015 during the Rule 32 proceeding, which is a post-trial proceeding that is part of the original criminal action. Rule 32.3, Arizona Rules of Criminal Procedure. The defendant was indicted for the 14-yearold victim's murder in October 2005, and was tried and convicted of capital murder following a 24-day trial held that began with *voir dire* in February 2010 and concluded with the jury's verdict of death as the sentence on April 12, 2010.

Who is a victim?

Both the State and the defendant agree on the applicable law. A "victim" is currently² defined by the Crime Victims' Rights statute as:

...[A] person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative³ of the person...

A.R.S. §13-4401(19); *see also*, Ariz. Const. art II, §2.1(C) (Victims' bill of rights defines a victim, in part, as "a person against whom the criminal offense has been committed or, if the

¹ To avoid confusion, the complainant Ms. Sandra Brown will be identified as "Ms. Sandra Brown," and her sister will be referred to a "Ms. Darlene Brown."

² FN 5: Initially, the VBR [Victim's Bill of rights] defined "victim" to include a deceased or incapacitated person's "spouse, parent, child or other lawful representative." 1991 Ariz. Sess. Laws, ch. 229, § 7 (1st Reg.Sess.). In 2001, the Legislature amended the definition to include the deceased or incapacitated person's "immediate family," which it defined as "spouse, parent, child, sibling, grandparent or lawful guardian." 2001 Ariz. Sess. Laws, ch. 334, § 22 (1st Reg.Sess.). In 2005, the Legislature amended the definition of victim to its current version. 2005 Ariz. Sess. Laws, ch. 325, § 6 (1st Reg.Sess.).

Allen v. Sanders, 237 Ariz. 93, 346 P.3d 30, 32-33 (Ct. App. 2015).

³ ARS 13-4401(11): "'Lawful representative' means a person who is designated by the victim or appointed by the court and who acts in the best interests of the victim." ARS 13-4403 sets forth a method by which the court appoints a "lawful representative" for a victim.

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person is killed or incapacitated, the person's spouse, parent, child or other lawful representative..."); *see State v. Fulminante*, 193 Ariz. 485, 502, 975 P.2d 75, 92 (1999) (defendant's right to request "rule of exclusion of witnesses" did not include exclusion of victim's mother. "The victim's mother is considered a victim in a homicide case. *See* Rule 39(a); A.R.S. § 13-4401(18).").

Ms. Sandra Brown is the mother of Tommar Brown, who was murdered April 1, 2004. Although factual matters were not conceded by the State for purposes of this hearing, in an ancillary pleading not addressed herein,⁴ the State conceded that Ms. Sandra Brown is a statutory victim.⁵ Notice of Potential Conflict filed 8/14/2015 at 1. The plain language of the statute indicates that Ms. Sandra Brown, the victim's mother and a "parent," comes within the statutory definition of a "victim." Ms. Sandra Brown does not believe that she was notified of any victim's rights.

Ms. Sandra Brown concedes that at the time of his death, her son "was living with Ms. [Sandra] Brown's sister, but Ms. [Sandra] Brown saw him regularly." Motion to Reopen at 1. "Ms. [Sandra] Brown's sister" is Ms. Darlene Brown, who is also the victim's aunt and a statutory victim of the defendant's criminal actions in her own right.⁶

The 2010 trial transcript discloses that Ms. Darlene Brown, testified during the guilt phase and also provided a victim impact statement during the penalty phase:

At trial, during the guilt phase, Ms. Darlene Brown testified under oath that she raised and had legal custody of her sisters' children, including the victim since he was three years old (RT 3/15/2010 at 63-65, 67 (as she had also raised her two sisters' other children)).

At trial, during the penalty phase, Ms. Darlene Brown presented the Victim impact statement in which she stated that she had raised the 14 year old victim since he was 3

⁴ In FN1 at p.2 of the victim's Response to Notice of Disclosure, counsel for Ms. Sandra Brown addresses the Notice of Possible Conflict specifically denies the existence of a conflict. ("...No conflict exists in this matter. Mr. Hammond sent a letter to the State pointing out that ER 6 seemed to resolve any remote question of conflict. The State has never responded."). The Court will not further address this claim unless requested by the parties.

⁵ "Sandra Brown, murder victim Tommar Browns mother, is a statutory victim under A.R.S. § 13-4401(19)..."

⁶ Ms. Darlene Brown was a victim of the attempted second degree murder conviction, charged as Count 2, Attempted First Degree Murder, in the indictment, during the course of the series of events that also led to Tommar's death and resulted in the defendant's conviction for first degree murder as to Tommar.

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(RT 4/8/2010 at 14-15(raised him since age of three; he was more like my son than my sister's son; "I miss him and my family [does] ...especially his mother"))).

Ms. Darlene Brown's representations to the Court about having raised the victim for the eleven years preceding his death coupled with the statutory language indicates to the Court that Ms. Darlene Brown is also a "victim," not only in her own right but also as the "legal representative" of the victim. Ms. Darlene Brown was afforded victims' rights.

What is the State's obligation?

The State does not concede that the State failed to comply with the rights afforded under the Victim's Bill of Rights.

The Court finds that Arizona statutory and constitutional definitions of "victim" consistently speak in the singular, providing rights to a person who is in a certain relationship to the victim. It is unclear to the Court whether the Constitution, and the governing statute, contemplate a requirement that notifications be given to a single victim or to multiple victims, as the singular rather than plural references continue. A.R.S. § 13-4408 (A)(1) ("...the prosecutor's office shall give the victim notice of the following: 1. The victim's rights...")

Certainly trial and appellate courts have permitted multiple victims to assert victims' rights. *Morehart v. Barton*, 226 Ariz. 510, 250 P.3d 1139 (2011) (two women identified as murder victim's family were identified as "victims" for determination of having no right to attend ex parte hearing on procedural mitigation evidence); *State v. Madrid*, 207 Ariz. 296, 300, 85 P.3d 1054, 1058 (Ct. App. 2004) (three children, identified as victims, entitled to travel expenses as restitution); *State v. Rose*, 230 Ariz. 500, 297 P.3d 906 (2013) (victim impact statements included statements from the officer's widow, oldest son (whose written statement the boy's mother read), mother, father-in-law and a short poem read by the officer's mother). Nonetheless, the Court declines to find that the court's broad interpretation of who may be a victim necessarily endorses a requirement that the State identify and notify any and all potential victims.

Although Ms. Sandra Brown suggests that her views on the death penalty may have affected the State's consideration of her rights, at sentencing, a victim's opinion of the sentence to be imposed is not relevant even if the victim desires a life sentence.⁷ *State v. Glassel*, 211 Ariz. 33, ¶91, 116 P.3d 1193 (2005); *Lynn v. Reinstein*, 205 Ariz. 186, 68 P.3d 412 (2003).

⁷ Victims cannot make a sentencing recommendation. "[V]ictims' opinions about what sentence should be imposed in a capital case are constitutionally irrelevant" and should be precluded. *Glassel*, 211 Ariz. at ¶91. This is true even if the victim would recommend a life sentence. *Id.* at ¶¶89-91; *Lynn v. Reinstein*, 205 Ariz. 186, 68 P.3d 412 (2003). "What makes victim statements relevant is the evidence of the impact of the crime." *Id.* at ¶91.

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The Court notes that during the sentencing proceeding of the trial, at the beginning of the penalty phase, Ms. Darlene Brown spoke on her own behalf (“I miss him”) and on behalf of his family and his mother (“I miss him and my family does...especially his mother.”).

The Court finds that the State afforded victims’ rights to Tommar Brown’s statutory victim through Ms. Darlene Brown.

What is the remedy?

Even if Ms. Sandra Brown was entitled to exercise victims’ rights under the Arizona Constitution and the statute, and even if the State failed to afford Ms. Sandra Brown certain rights, Ms. Sandra Brown is not entitled to relief.

A.R.S. § 13-4436 sets forth a procedure should a failure to comply with victim’s rights be demonstrated:

- A.** The failure to comply with a victim's constitutional or statutory right is a ground for the victim to request a reexamination proceeding within ten days of the proceeding at which the victim's right was denied or with leave of the court for good cause shown. After the victim requests a reexamination proceeding and after the court gives reasonable notice, the court shall afford the victim a reexamination proceeding to consider the issues raised by the denial of the victim's right. Except as provided in subsection B, the court shall reconsider any decision that arises from a proceeding in which the victim's right was not protected and shall ensure that the victim's rights are thereafter protected.
- B.** The failure to use reasonable efforts to perform a duty or provide a right is not cause to seek to set aside a conviction after trial. Failure to afford a right under this chapter shall not provide grounds for a new trial. A victim who was given notice of a plea or sentencing proceeding may make a motion to reopen a plea or sentence only if the victim was not voluntarily absent from the proceeding and has asserted the right to be heard before or during the proceeding at issue and the right to be heard was denied and, in the

In *Lynn v. Reinstein*, 205 Ariz. 186, 68 P.3d 412 (2003), the Supreme Court reviewed *Booth v. Maryland*, 482 U.S. 496 (1987), and *Payne v. Tennessee*, 501 U.S. 808 (1991), and held that the victim cannot make a sentencing recommendation:

“While the Court has recognized the victims’ desire to tell jurors of the effect of a defendant’s crime upon their lives, the victims’ right to speak is not unlimited. Statements relevant to the harm caused by the defendant’s criminal acts are no longer barred by the Eighth Amendment. But statements regarding sentencing exceed those bounds and violate the Eighth Amendment, and therefore are prohibited. Victims’ recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant to the harm caused by the defendant’s criminal acts or to the defendant’s blameworthiness or culpability.” 205 Ariz. at ¶17.

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case of a plea, the accused has not pled to the highest offense charged. This subsection does not affect the victim's right to restitution, which the victim may seek to enforce at any time.

C. Unless the prisoner is discharged from the prisoner's sentence, the failure to use reasonable efforts to provide notice and a right to be present or be heard pursuant to this chapter at a proceeding that involves a post-conviction release is a ground for the victim to seek to set aside the post-conviction release until the victim is afforded the opportunity to be present or be heard.

D. If the victim seeks to have a post-conviction release set aside pursuant to subsection C, the court, board of executive clemency or state department of corrections shall afford the victim a reexamination proceeding after the parties are given notice.

E. A reexamination proceeding conducted pursuant to this section or any other proceeding that is based on the failure to perform a duty or provide a right shall commence not more than thirty days after the appropriate parties have been given notice that the victim is exercising the right to a reexamination proceeding pursuant to this section or to another proceeding based on the failure to perform a duty or provide a right.

Ariz. Rev. Stat. Ann. § 13-4436 (emphasis added).

The Court finds that the plain language of the statute precludes the remedy initially sought by Ms. Sandra Brown. A.R.S. §13-4436(B). First and foremost, the statute specifically states that “failure to afford a right under this chapter shall not provide grounds for a new trial.” The Constitution similarly provides that “[a] victim’s exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.” Ariz. Const. art. II, § 2.1(B).

Ms. Sandra Brown emphasizes that her rights were not afforded at trial or at sentencing, suggesting that the two are independent proceedings. The Court finds that Arizona capital decisions do not support Ms. Sandra Brown’s position. A capital trial is a single trial consisting of three phases. ARS §13-752 (I) references “any prior phase of the trial” having previously identified the determination of guilt, the aggravation phase and the penalty phase. A.R.S. § 13-752(E), (F) (G), (J), (K). A.R.S. § 13-751(B), (C) references the “sentencing proceeding” as consisting of the “aggravation phase of the sentencing proceeding” and the penalty phase of the sentencing proceeding,” respectively. Finally, in a Footnote in *Ring III* (*State v. Ring*, 204 Ariz. 534, 553-54, 65 P.3d 915, 934-35 (2003)), the Court stated unequivocally:

... A capital trial comprises just one trial, divided into guilt and sentencing phases, and has always been understood as such, both by this court and by the U.S. Supreme Court. *See, e.g., Tuilaepa v. California*, 512 U.S. 967, 971–72, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994) (holding trier of fact must find one aggravating circumstance at

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either the guilt or penalty phase); *Payne v. Tennessee*, 501 U.S. 808, 817, 823, 825–26, 111 S.Ct. 2597, 2604, 2607–08, 115 L.Ed.2d 720 (1991) (repeated references to “guilt phase” and “penalty phase” of capital trial); *State v. Smith*, 203 Ariz. 75, *passim*, 50 P.3d 825, *passim* (2002) (referring to “sentencing phase” and “sentencing hearing”); *Ring I*, 200 Ariz. at 279 ¶ 42, 25 P.3d at 1151 (referring to a “separate evidentiary hearing”). The only courts of which we are aware that have considered the argument that a capital trial consists of two “trials” rather than two phases of one trial have rejected the dissent's approach. *Flamer v. Delaware*, 68 F.3d 736, 758–59 (3rd Cir.1995) (“The guilt and penalty phases of a capital trial are parts of a single proceeding, and there is no constitutional requirement that they be treated as if they were two entirely separate trials.”); *Holland v. Mississippi*, 705 So.2d 307, 330 ¶ 61 (Miss.1997) (sentencing phase of a capital trial not a separate trial, but that phase of the case that concerns sentencing).

Arizona statutes reflect the single capital trial approach accepted by our court and the Supreme Court. Arizona law refers to the sentencing proceeding as the capital trial's “penalty phase.” *E.g.*, A.R.S. § 13–703.C. In addition, former and current capital sentencing statutes permit use at the sentencing phase of evidence adduced during the guilt phase of the trial. *Id.* §§ 13–703.C (2001), 13–703.D (Supp.2002).

The Court finds that Ms. Sandra Brown's request to reopen sentencing is precluded by the governing statute and the Arizona Constitution.

Although Ms. Sandra Brown initially sought a resentencing hearing, she conceded at oral argument that the governing statute does not specifically address resentencing but actually provides that “a reexamination proceeding is required when the rights of a victim are ignored.” FTR 11/3/2015 at 3:25; *see* statutory provision, A.R.S. § 13-4436.

A.R.S. § 13-4436 establishes certain preconditions for a “reexamination hearing.” The first is that Ms. Sandra Brown file a request for a reexamination hearing “within ten days of the proceeding” at which the right was allegedly denied, or “with leave of court for good cause shown.” Ms. Sandra Brown filed her request, without seeking leave of court, five years after the sentencing hearing occurred in April of 2010. Ms. Sandra Brown stated only that she “did not believe” that she had been notified; counsel indicated that defense counsel had “only recently learned” of the oversight. The Court finds that representation inadequate to establish “good cause.” In addition, Ms. Sandra Brown has not established that “the rights of a victim” were not protected, as Ms. Darlene Brown addressed the jury on behalf of herself, her family and Ms. Sandra Brown at the sentencing hearing, even though mitigation was not presented.

Ms. Sandra Brown currently seeks “only that her voice be heard,” as would have been her right had she been recognized as a statutory victim in her capacity as the biological mother of the

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victim. At oral argument she suggested that this be accomplished by holding a settlement conference at this post-conviction stage at which Ms. Sandra Brown may have her views considered. The Court commends Ms. Sandra Brown's counsel for his creativity in invoking Rule 17.4, Plea negotiations and agreements. The Court, however, finds that its authority is constrained by the governing statute.

A.R.S. § 13-4436 affords a victim a reexamination hearing under certain circumstances. The Court finds that Ms. Sandra Brown is not entitled to a reexamination hearing.

Both Arizona law and court decisions indicate that victims' rights must be protected the prosecutor or by privately-retained counsel. *Lindsay R. v. Cohen*, 236 Ariz. 565, 567, 343 P.3d 435, 437 (Ct. App. 2015), *review denied* (May 26, 2015). The defendant cites no authority for the proposition that a defendant is entitled to assert the rights on behalf of a third-party victim.

IT IS ORDERED denying Defendant's Motion to Join Sandra Brown's Motion to Reopen Sentencing filed 8/31/2015.

Based on the above,

IT IS FURTHER ORDERED denying the Ms. Sandra Brown's Motion to Re-Open Sentencing filed 8/5/2015.